Supreme Court, U.S.
FILED
DEC 16 1994
OFFICE OF THE CLERK

No. 94-913

# In the Supreme Court of the United States

## October Term, 1994

**DORIS BERRY,**
**as Personal Representative of the**
**Estate of Lee F. Berry, Jr., deceased,**
*Petitioner,*

v.

**CITY OF DETROIT,**
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held the petitioner's evidence was insufficient to sustain municipal liability under 42 U.S.C. §1983 based on a city policy or custom of inadequate training or discipline of its police officers on the use of deadly force that amounted to deliberate indifference on the part of the City to constitutional rights in the City?

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals, Pet. App. B-1 to B-21, is published at 25 F.3d 1342 (6th Cir. 1994). The decisions of the district court are not published.

## JURISDICTIONAL STATEMENT[1]

The court of appeal's judgment was entered on June 17, 1994. Pet. App. B-1. A timely petition for rehearing was denied by order entered on August 23, 1994. Pet. App. A-1. The petition was filed on October 18, 1994. This Court has jurisdiction under 28 U.S.C. 1254(1).

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[1] There is no parent or subsidiary company to be listed pursuant to Supreme Court Rule 29.

## STATUTE AND CONSTITUTIONAL AMENDMENT

The Seventh Amendment and 42 U.S.C. §1983 are set forth in the Petition. Pet. 1-2.

## STATEMENT

### A. Facts of Record

**1. Organization of Detroit's Police Department.** The City Charter established the Board of Police Commissioners who were appointed by the Mayor subject to the approval of the City Council; the Police Department operated under general rules and policies enacted by the Board of Police Commissioners and all rule and policy changes were made by that body. The Police Chief was the chief disciplinary officer and appointed Boards of Review to determine if deadly force was used due to police misconduct and to ensure the Prosecutor received a complete investigation. Homicide's special assignments squad, conducts the investigation of improper use, and makes a recommendation to the Prosecutor regardless of the Board's determination. *See infra* at page 8.

2. **The Basic Facts Covering The Shooting.** At 5:00 o'clock on June 23, 1987, Lee Berry, Jr. entered a work van with his younger brother Dwayne and nephew David and proceeded to his home. During heavy rush hour traffic he committed several traffic violations including running red lights and pulling to the wrong side of the road to make a right turn. TR IV 113-14, 116-20.

Defendant Joseph Hall (Hall), a police officer on duty, observed the violations and followed the van on his motorcycle to 3810 West Outer Drive. An altercation followed in which Hall shot and mortally wounded Berry. Berry was not under the influence of drugs or alcohol. Hall had never been involved in a fatal shooting. TR I 29-30, TR IV 68, TR IXa 21, 28, TR XA 8, 38.

Officer Joseph Hall joined the Police Department in 1962; he attended annual weapons qualifications in 1975-77 and 1979-84. The officer responsible for training and support at the Detroit Police Academy testified that Hall passed the fatal force exam because he would not have otherwise been state certified or passed the academy, and he was so certified. Hall also testified that he had received firearms and deadly force policy training at the Academy, during annual qualifying sessions, through written updates and at daily roll call reviews. Hall was aware that he was not permitted to carry hollow point bullets and that the deadly force policy would not have permitted him to use deadly force while arresting Berry for a misdemeanor. TR VIIIa 9-20, 61-68, TR IXa 40, TR XIX 47, TR XX 5, TR VIIa 9-20.

Officer Hall testified that he followed Berry's van and activated his siren and lights; the van was dipping into the wrong lane and was traveling 60-70 mph in a 30 mph zone. Upon arriving at the Berry home Hall blocked the driveway with his cycle; he drew his gun because of the highspeed chase and his fear that Berry was armed. When Hall reached for his cuffs, Berry spun around and struck Hall's chest. Hall then hit Berry's rib cage, struck his head with his gun, and knocked him to the ground. As Hall retreated towards the street, he turned after hearing the children tell Berry to leave the officer alone. Berry then hit Hall, broke his glasses, forcing glass into his face and knocking Hall either to his knees (as indicated by his deposition) or almost on his knees (as indicated at trial). Hall testified that Berry was close when he fired the weapon. Hall fired his gun because Berry had attacked him twice and he felt he was going to die. TR Xa 17, 27-28, 65-68, TR IXa 6-8, 10-13, 25, 29, 31, 35-36, 48-52, 54-58, 89, TR VIIIa 86.

A forensic chemist concluded that the gun was fired from probably three but possibly 10 feet, from Berry's hands. Berry could have had his hands close to a fired gun, reached for a gun, or touched its barrel or Hall's hands. TR VIIIb 4, 10-11, 13-16, 23-24, 30, 33. An evidence technician, concluded that the bullet holes would not have been as high if a 5'10 inch person had fired while holding a gun straight. Berry's skinned knuckles

suggested punching or fighting. An expert firearms examiner testified that there was no evidence of a close range firing and the distance of the gun's muzzle to the clothing could have been 4 to 6 feet. TR VII 47, 51, 53, 55-56, 58, 123, 133, 139-40, 146, TR VI 155. The medical examiner who performed the autopsy concluded that a struggle occurred and that Hall's report was inconsistent with the forensic evidence. TR IV 13, 103-06, 165.

3. **Testimony of Plaintiff's Expert.** Frederick Postill, a former sheriff and trainer of police operations, testified he performed training, and consulting work with police, corrections and security operations but he did not specify the type of training that was provided. TR XIIa 28-29. Although Postill had completed two thirds of the program at Michigan State University School of Criminal Justice towards a doctorate degree, the record did not specify the focus of program he was completing and he had never graduated from any university with a degree in criminal justice. TR XIIA 4, 31-32

Postill was a deputy sheriff from 1966 to 1968; he was fired twice during the two years he was a deputy sheriff. Postill's duties as deputy sheriff included general patrol, investigation work, riding a black and white, and responding to calls. TR XIIA 16, TR XIIa-5. Postill was elected as sheriff in 1972, took office in January, 1973 and left that position in January 1977. TR XIIa-6. No police background or training was needed to run for the position of sheriff. TR XIIa 16. While in the position of sheriff, Postill did not receive training at any academy. TR XII 15. The second time he ran for the sheriff position he lost. TR XIIa 17. Postill never took any exams administered by the State of Michigan when he was a deputy sheriff and did not need to be certified by the State of Michigan when he was elected Sheriff. TR XIIa 25. He had not received formal police training on the proper use of firearms. TR XIIa 26. Postill had a total police experience of three years and six months experience as a full time officer. TR XIII 13, 25.

Postill's testimony indicated that Detroit had about 5,000 sworn police officers as of 1987. J.A. 768. *Accord: NAACP Detroit Police Officers Ass'n.*, 591 F.Supp. 1194, 1197 (E.D. Mich. 1984). Postill believed officers should not use deadly force unless techniques like impact weapons were exhausted first. TR XIIa 53, 102-03, TR XIII 56-58.

Postill testified (apparently based upon the representations of the attorney for the plaintiff) that there were 636 shooting reports over a five (5) year period. Plaintiff's counsel had provided Postill with reports concerning 187 out of the 636 shots fired by police weapons from 1982 to 1987. Of those 636 shooting reports, the 187 reports selected by the plaintiff's lawyer involved a shooting at a person, rather than a dog or other object. J.A. 761-762. There was no testimony of the method by which the 187 were chosen and when Postill did the study he was unaware that records of the remaining 449 shootings existed. Postill testified that 15 officers were disciplined out of the 187 shots fired he reviewed; only one of these 15 cases involved a fatality. TR XIIa 68, TR XIII 68, 92, 94, 111-12, 114, 128-29.

Postill then described 13 shootings over a five year period (1983 through 1987) in which either he believed there should have been a sanction imposed, but was not, or where there was a sanction imposed which in his view was inadequate sanction. Thus, over the five year period, there were an average of three (3) incidents a year in which Postill believed that the discipline was inadequate. He offered no statistics or other views as to why the thirteen (13) incidents over a five year period constituted a policy or custom, nor did he offer reasons supporting his conclusion that the punishment should have been more severe.

Nine (9) of the 13 shootings he described took place before the March, 1985 decision of the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985) and ten (10) before the formal change in City policy in 1986 to incorporate that decision into its policies. When describing the facts of these cases, Postill

did not discuss whether the officer who fired shots at a distance had reason to believe that the suspect was armed or otherwise posed a danger.

None of the underlying police records of the incident was offered or admitted into evidence.

No discipline resulted in the following cases: on 6/13/87 Officer EG was wounded twice by a citizen before he fired a shot which killed a bystander; on 2/18/86 Officer M.S. fatally shot an unarmed burglary suspect from 25 feet; on 12/1/86 Officer R.D. shot at an unarmed burglary suspect from 60 feet; on 11/13/86 Officer C.B. shot at an unarmed larceny suspect; on 5/22/85 Officer G.D. fired shots after observing an unarmed person on a roof; on 1/6/84 Officer J.J. barricaded himself in a garage and fired shots from a shotgun; on 9/19/84 shots were fired when Officer R.W. had a dispute with another officer; and on 7/6/83 Officer T.W. shot at a car after a woman indicated a suspect was leaving with a television.

Discipline was recommended but none was taken in the following cases: on 1/23/85 Officer M.C. fired six shots during an attempted burglary; on 12/29/85 Officer M.S. accidently shot her son while demonstrating her weapon; on 11/8/85 Officer J.G. shot at a possible burglary suspect; and on 2/28/85 Officer D.R. shot at the floor twice while in a domestic fight. On 8/18/85 Officer D.A. fired shots and threatened to get his gun; he received a 5 day suspension held in abeyance. TR XIIa 73-79, TR XIII 71, 115-16.

Postill reviewed some of the 1983-1987 "shots fired" investigative reports made concerning discharges of officer's guns; 502 out of 636 shooting incidents were justified as "self defense." He did not define the term, and his testimony did not appear to take into account the fact that Detroit's fatal force policy linked self-defense and defense of others together. Def. Exh. 308. Given the shooting distance and crimes, he believed that self-defense was not possible that frequently. Postill testified that the 277 rounds shot at burglary suspects was improper under

Detroit's policy and the law and no discharges for on duty shootings occurred in 1983-87. Because most officers involved in the shootings were seasoned veterans with 10-12 years of experience, Postill concluded they were adequately trained, but that the Department tolerated the reckless use of firearms. TR XIIa 63, 67, 81-82, TR XIII at 127.

Postill equated "deliberate indifference" by which he meant "conscious knowledge of something and not doing anything about it" with "gross negligence"; and testified with regard to the Detroit Police Department that: "It's my opinion that this failure to direct and discipline and train their officers not to use improper deadly force constitute a pattern of gross negligence." TR XIIa 115-16, Pet. B-19 n.12. Postill did not compare the adequacy of Detroit's training and discipline concerning use of deadly force with the practices of other departments. He acknowledged that his study was not "scientific." He gave his view that Detroit's training programs concerning the act of deadly force were fine, but that the problem arose because many experienced officers "don't follow Department policy." TR XIIa 66, 69, TR XIII 127.

**4. Deadly Force Policy, Training, And Discipline.**

Detroit's fatal force policy was updated after *Tennessee v. Garner*, 471 U.S. 1 (1985); it authorized officers to use fatal force in self-defense or in defense of someone else only if the threat of injury was immediate and life threatening. Pursuant to the policy, police were taught that deadly force should be used only as a last resort. TR XIIb 34, 64, 73-75; Ex. D-308.

The State of Michigan required certified Michigan law enforcement officers to complete 440 training hours and a certification examination. The Detroit Academy required 600 to 700 training hours and an additional exam. Officers in Detroit initially took a 60 hour firearms training course for weapon proficiency and were required to score 100% on a written fatal force policy examination; thereafter they took annual refresher courses when they qualified for firearms. The fatal force policy was reinforced through roll calls, video tapes, and handouts;

annual weapon qualifications assured officers had weapon proficiency and were aware of the limitations on their use. TR XVIIIa 7-8, 27-28, 48, 96-97, TR XIXa 4-5, 46, TR XX 4-5, 48.

Officers were disciplined for intentional violations of the fatal force policy, but officers who justifiably used fatal force in self-defense were not disciplined because they were expected to protect themselves and citizens. Testimony for the City disclosed there was no department custom of not providing discipline or training on firearms use or of discharging guns with impunity. TR XXIb 19-21, 27, XVIIIa 60-68.

From 1982 through 1987 the Detroit Police Department ordered 38 officers to be retrained and 52 to be disciplined for improper use of deadly force. TR XVIIIa 70-71.

**B. Trial And Post Trial Proceedings**

Detroit objected to the introduction of Postill's testimony. TR XB 4-5, TR XIIa 35. Detroit moved for a directed verdict because, among other things, plaintiff had not met its burden of proving that any failure by the City was the moving force of Hall's conduct, plaintiff's evidence was insufficient because the sample of 187 shootings was incomplete, and the testimony did not show if City policymakers were aware of inadequacies in discipline or that they made a deliberate choice of not enforcing their deadly force policy. TR XXIa 3-8, 29-32. The Court deferred ruling on the matter.

The jury awarded six million dollars in compensatory damages. Thereafter, the Court denied Defendants motions for directed verdict and entered judgment against the City and Hall for six million dollars plus statutory interest. TR XXIV 7, R. 352. The City and Hall moved for a new trial and/or judgment notwithstanding the verdict. R. 354. These motions were denied. R. 375. In its Rule 50(b) motion for judgment as a matter of law, the City argued it was entitled to judgement because the plaintiff failed to offer evidence that any failure to

train or discipline was a custom or policy of the City. Detroit and Hall filed timely appeals and while the appeals were pending, the parties settled Hall's appeal. R. 377. As a result, the City's obligation under the judgment was reduced to $2,500,000, and the issue was limited to the City's liability.

On appeal, the City argued the evidence was insufficient to sustain a judgment of municipal liability against the City under 42 U.S.C. §1983, and particularly that: "Postill's Testimony Is Not a Sufficient Basis for Imposition of Municipal Liability under 42 U.S.C. 1983," "Postill's Review of the Files Was not a Study of the Type Reasonably Relied upon by Experts," and that "Postill's Study Was Not Based upon Evidence of Record, and was Based upon an Error of Law, which Equated Violations of Detroit Policy with Violations of Constitutional Rights." Appellant's Brief at 40-41.

**C. The Decision of The Sixth Circuit**

Detroit appealed on the ground that the evidence, read most favorably to the plaintiff, was not sufficient to show that any policy or custom of the City caused a violation of the constitutional rights of Berry.

In its June 17, 1994 decision, the court of appeals reversed the judgment against the City after holding "that the plaintiff's evidence "was insufficient to prove deliberate indifference on the part of the City such as to give rise to municipal liability under 42 U.S.C. §1983." App. B-1. In reaching its decision, the court recognized that the evidence had to be viewed in the light most favorable to the petitioner with all reasonable inferences being viewed in her favor, and expressly noted that the court "'must not pass on the credibility of witnesses, weigh the evidence, or substitute our judgment for that of the [factfinder].'" App. B-7.

On the failure to train issue, the court found that petitioner had offered no evidence regarding any specific deficiencies in the initial training, and noted that the plaintiff's

expert had testified that the initial training program was adequate. App. B-7. The court concluded that Detroit's formal deadly force policy was well known to all members of the police department, including Hall." App. B-8.

On the failure to discipline issue, the court held that the testimony offered did not support the jury's verdict. App. B-21. The court ruled that the expert testimony of Postill was received in violation of Rule 704(a) of the Federal Rules of Evidence. As for Postill's opinion concerning the 161 incidents about which he felt he had "sufficient" information to base an opinion, the court ruled that "at best, it shows that discipline was not as frequent or as severe as he would have liked. It does not show a consistent pattern of ignoring constitutional violations. *No other evidence, such as witnesses or even the actual police files, was offered concerning any of the incidents in which the discipline allegedly was lacking or inadequate.*" App. B-22.

## ARGUMENT

Petitioner claims her Seventh Amendment right to trial by jury was violated when the court of appeals incorrectly concluded the evidence was insufficient to go to the jury "[s]ince petitioner clearly presented more than sufficient proofs on the issue of the City of Detroit's failure to train and discipline its police officers." Pet. 16. Petitioner's argument, which is couched as a constitutional violation, is nothing more than an argument based on the sufficiency of the evidence. For if the evidence was insufficient there is no violation of the Seventh Amendment because trial and appellate judges withdrew cases from juries at common law, just as they do now. And the Seventh Amendment expressly incorporates "the rules at common law" for reexamination of factual issues. *See* U.S. Const. Amend. VIII, Pet. 1-2, and *Dimick v. Scheidt*, 293 U.S. 474 (1935).[2]

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[2]Both *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1947) and *Cone v. West Virginia Paper Co.*, 330 U.S. 212 (1947)

No conflict between the circuits is alleged or shown, nor is there any conflict between the decision below and a decision of this Court. Indeed, Petitioner does not identify any statement of the law by the court below as erroneous, and her argument that there was sufficient evidence to support liability under 42 U.S.C. §1983 is based entirely upon the record in this case and is incorrect. The petition raises no legal issue of general application or importance and should be denied.

1. Petitioner's expert conceded that the training programs of Detroit were "fine". TRXIII 127. The uncontradicted record reflected that Detroit police officers received extensive training on deadly force upon joining the force and thereafter received annual updates, training bulletins, and training at daily roll calls. Plaintiff's evidence of the inadequacies of training consisted wholly of Postill's expert testimony. The court of appeals properly viewed the "evidence in the light and with all reasonable inferences most favorable" to the petitioner, and nevertheless found that the district court erred in permitting the jury to impose judgment on the basis of such evidence. Pet. B 7-8. In so ruling the court of appeals decision was consistent with the decisions of this Court and other circuit courts.[3]

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involved a court of appeals directing or setting aside the district court's judgment in the absence of a timely motion for jnov. Here, the City submitted a timely motion for jnov in the district court which gave the court of appeals a sufficient basis for overturning the judgment as a matter of law and remanding the case for an entry of judgment in its favor.

[3]Without providing citation to the record, Petitioner asserts the evidence went far beyond the anecdotal showings made in *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), and *Zuchel v. City and County of Denver*, 997 F.2d 730 (10th Cir. 1993) because Petitioner documented case after case of undisciplined improper use of deadly

2. Petitioner argues that the primary reason why this Court should grant certiorari is because it has never ruled on the failure to discipline issue. Pet. 22. Yet, Petitioner has not identified, nor has she argued, that the Sixth Circuit's decision is in conflict with the decision of another United States court of appeals on the same matter, or that the Sixth Circuit has departed from the accepted and usual course of judicial proceedings. Supreme Court Rule 10.1 (a); *Braxton v. United States*, __ U.S. __, 111 S.Ct. 1854, 1857 (1991).

In holding that Petitioner's expert testimony was insufficient to prove that the City's failure to impose adequate

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force. Pet. 25.

The Sixth Circuit correctly noted that the decisions relied upon by Petitioner did not support a finding of liability against a municipality under 42 U.S.C. § 1983. App. B-22, 23. In *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), the Fourth Circuit had before it plaintiff's undisputed evidence regarding inadequate training including testimony of internal police department records, seven lay citizens of the City, eight present or former officers of the City police department, an assistant district attorney, and a former legal advisor to the police department.

In *Zuchel v. City and County of Denver*, 997 F.2d 730 (10th Cir. 1993) the expert, among other things, had over 16 years of experience as a New York City police officer. As his doctoral research, the expert had analyzed New York City police shooting incidents during a four year period, and as a senior fellow at the Ford Foundation he had projects which helped police avoid the use of deadly force. There was testimony that the Police Chief, who was apparently Denver's policy maker, was informed by the district attorney of the need for more training, and there was evidence of six police shootings within a six-week period but Denver took no action. In *Zuchel*, unlike this case, the expert did not acknowledge that training was fine, but "the expert supported his opinion that the training program was inadequate with specific deficiencies supported by the record." *Id.* at 738, 739 n.4. *See also* footnote 4 below for a discussion of *Fiaco v. Rensselaer, N.Y.*

discipline amounted to deliberate indifference to the rights of its citizens, which failure proximately caused the death of Berry, the Sixth Circuit applied the deliberate indifference standard adopted by this Court in *City of Canton v. Harris*, 489 U.S. 378, 379 (1989) and found it required a showing of a history of widespread abuse that has been ignored by the City. Pet. B-21. Petitioner does not take issue with that standard of law and we submit that it is correct.

Petitioner makes arguments related to the alleged error the court of appeals made when it examined the qualifications of her expert, Postill. *See, e.g.*, Pet. 20- 22. These arguments ignore the fact that the court examined not only the qualifications of her expert, but also his testimony. Pet. B-22. The court's ruling on the deficiencies in Postill's testimony and the lack of record evidence demonstrating a pattern by the City of ignoring constitutional violations, provides an ample basis for the decision below. An examination of Postill's testimony demonstrates that there was no error.

Postill's opinion was taken from PX 154 which was a "one-page summary sheet" of "shots fired investigative reports" which was never offered into evidence. Pet. B-18, TR XIIa 43-44. The other records Postill reviewed (PX 220) were not offered into evidence. As a result, neither the trial court nor jury could determine from the evidence whether his opinion was reasonably based upon the underlying facts. Postill's analysis of shooting incidents, did not review the underlying facts of each incident as demonstrated by the fact that at least five incidents he viewed as unjustified were fleeing felon shootings that were authorized under Michigan law and which occurred before this Court's 1985 decision in *Tennessee v. Garner*, 471 U.S. 1, 16 (1985) changed the deadly force standard. TR XXIIa 54-83, TR XIII 110-116.

In addition, Postill considered shootings to be "bad" and to require discipline if they violated any department policy even though Detroit's deadly force policy, which allowed deadly force only for "life threatening" circumstances imposed more severe

limitations on the use of force by police officers than the Constitution. *Graham v. Connor*, 490 U.S. 386, 396 (1989)(allowing deadly force if there is any immediate threat to the safety of officers or others); DX 308.

Postill's testimony as to how many shootings were "bad" had no probative force in showing "deliberate indifference to constitutional rights," without a demonstration that the shootings were constitutional violations. From Postill's testimony, it was impossible for a jury to determine which, if any, alleged "bad" shootings were violations of Detroit policy, but not violations of the Constitution, and which alleged "bad" shootings were violations of constitutional rights at the time of the shootings. Indeed, as the court noted Postill included in his study an incident where an officer did not shoot until he was wounded twice. App. B-18. Postill's failure to confine his review to shootings which violated constitutional rights meant that his testimony could not establish liability against the City for an asserted policy or custom of deliberate indifference to rights of persons under the Constitution.

Moreover, Postill's testimony failed to offer rational support for his view that more imposing sanctions, or more severe sanctions, to 13 of Detroit's 5,000 police officers over a five year period, would have changed the behavior of the police force. For it is only where the "inadequacy [is] so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 389, 390 (1989). *Accord: Jett v. Dallas ISD*, 491 U.S. 701 (1989) and *St. Louis v. Propotnik*, 485 U.S. 112 (1987).

When the Sixth Circuit's decision in *Berry*, is compared to the discipline case cited by Petitioner, it is evident that it does not conflict with that decision.[4]

Petitioner also failed to offer evidence showing that any City Official, City policy maker, or the Police Chief, made a "deliberate choice to follow" a practice or custom of inadequate discipline and that the asserted inadequacies arose from such policy. The official policy makers of Detroit were in fact, the Board of Police Commissioners; and while the Police Chief had control over disciplinary matters, he had no authority to make

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[4] In *Fiaco v. Rensselaer, N.Y.*, 783 F.2d 319, 331 (2nd Cir. 1986), "[n]o officer was reprimanded, suspended, discharged or demoted" by the municipality and procedures for the consideration of charges against police officers had never been implemented.

Petitioner also asserts that an experts use of "gross negligence" was found permissible in *Parker v. Williams*, 855 F 2d 763, 777 (11th Cir. 1988) in which the Eleventh Circuit upheld a jury verdict holding a county and sheriff liable under 42 U.S.C. 1983. Id. at 778. However, *Parker* was rendered before this Court rejected the gross negligence standard in *Canton v. Harris*, 489 U.S. 389, 388-89, 391-92 (1989). Moreover, *Parker*, 855 F.2d at 763 was withdrawn by the Eleventh Circuit and a new opinion substituted which reversed the finding of liability under Section 1983. See *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989).

policy changes.[5] *City of Canton v. Harris, supra,* 389 U.S. at 389; *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484 (1986).

In discussing the insufficient evidence of a pattern of ignoring constitutional violations, the court correctly noted that the uncontradicted evidence showed that the Police Department disciplined 52 police officers for violations of its deadly force policy, and required further "retraining" for an additional 38 officers over a five year period. Pet. B-22, TR XVIIIa 70-71. In this case, there was no "widespread practice that...is 'so permanent and well settled as to constitute a "custom or usage with the force of law.'" *St. Louis v. Propotnik,* 485 U.S. 112, 127 (1987); citing and quoting from *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 167-168 (1970); *Jett v. Dallas ISD,* 701, 736-37 (1989). Plaintiff's evidence simply failed to show a City custom of inadequate discipline. As a result the Sixth Circuit correctly held that evidence in this case is insufficient to impose municipal liability under 42 U.S.C. §1983. *Canton v. Harris,* 489 U.S. 389 (1989).

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[5]While not commenting on a theory of inadequate discipline, this Court has expressed its reservations about extending liability in a way which would involve the courts in extensive second guessing of the conduct of municipal officials, which would raise "serious questions of federalism." *Canton v. Harris, supra,* 489 U.S. at 392. Other courts of appeals have ruled, correctly in our view, that behavior of the Chief of Police of ignoring or departing from the City policy established by a higher policy making body, is insufficient to impose municipal liability under 42 U.S.C. §1983 unless the evidence shows that policy making body of the City made a deliberate choice to follow or acquiesce in a policy or custom which causes violations of constitutional rights. *Gonzalez v. Ysleta I.S.D.,* 996 F.2d 745 (5th Cir. 1993); *Auriemma v. Rice,* 957 F.2d 397 (7th Cir. 1992).

3. On appeal, the City argued that the evidence failed to show any policy or widespread custom by the City of inadequate training or inadequate discipline and that Postill's testimony did not fill that need because it was not based upon the evidence of record and was based upon an error of law. In our view the City properly and timely raised the issues decided by the court of appeals. In any event, this Court has held that "a court may consider an issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." *U.S. Nat. Bank of Or. v. Independent Ins. Agents*, 113 S.Ct. 2173, 2178 (1993), *citing, Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77, 111 S.Ct. 415, 418 (1990).

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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